

**DECISION OF THE BOARD OF APPEAL
OF THE EUROPEAN CHEMICALS AGENCY**

7 October 2011

*(Registration – Rejection – Registration fee – Late payment –
Admissibility – Refund of the appeal fee)*

Case number	A-004-2011
Language of the case	English
Appellant	Kronochem GmbH Germany
Representative	Kamila Pavelcová Dukol Ostrava, s.r.o. Chemická 1/2039 CZ – 709 03 Ostrava / Mariánské Hory Czech Republic
Contested decision	SUB-D-2114193011-62-01/F of 1 March 2011 adopted by the European Chemicals Agency (hereinafter the 'Agency') pursuant to Article 20(2) of Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (OJ L 396, 30.12.2006, p.1; corrected by OJ L 136, 29.5.2007, p. 3; hereinafter the 'REACH Regulation')

THE BOARD OF APPEAL

composed of Mercedes ORTUÑO (Chairman), Mia PAKARINEN (Legally Qualified Member and Rapporteur) and Andrew FASEY (Technically Qualified Member)

Registrar: Sari HAUKKA

gives the following

Decision

1. By its appeal, the Appellant seeks the annulment of the contested decision and requests the Board of Appeal to order the Agency to assign its substance registration dossier, which was rejected by the Agency, with a registration number.

RELEVANT LEGISLATION

2. The following provisions are relevant for the present decision.

3. Article 6(4) of the REACH Regulation provides:

'A submission for registration shall be accompanied by the fee required in accordance with Title IX.'

4. Article 20(2) of the REACH Regulation states:

'The Agency shall undertake a completeness check of each registration in order to ascertain that all the elements required under Articles 10 and 12 or under Articles 17 or 18, as well as the registration fee referred to in Article 6(4), Article 7(1) and (5), Article 17(2) or Article 18(2), have been provided [...].

[...]

If a registration is incomplete, the Agency shall inform the registrant, before expiry of the three-week or three-month period referred to in the second subparagraph, as to what further information is required in order for the registration to be complete, while setting a reasonable deadline for this. The registrant shall complete his registration and submit it to the Agency within the deadline set. The Agency shall confirm the submission date of the further information to the registrant. The Agency shall perform a further completeness check, considering the further information submitted.

The Agency shall reject the registration if the registrant fails to complete his registration within the deadline set. The registration fee shall not be reimbursed in such cases.'

5. Article 92(2) of the REACH Regulation provides:

'The appeal, together with the statements of the grounds thereof, shall be filed in writing to the Agency within three months of the notification of the decision to the person concerned, or in the absence thereof, of the day on which it became known to the latter, unless otherwise provided in this Regulation.'

6. Article 93(1) of the REACH Regulation provides:

'If, after consultation with the Chairman of the Board of Appeal, the Executive Director considers the appeal to be admissible and well founded he may rectify the decision within 30 days of the appeal being filed in accordance with Article 92(2).'

7. Article 3(6) and (7) of Commission Regulation (EC) No 340/2008 on the fees and charges payable to the European Chemicals Agency pursuant to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) (OJ L 107, 17.4.2008, p. 6; hereinafter the 'Fee Regulation') provides:

'Where the payment is not made before expiry of the deadline provided for in paragraph 5, the Agency shall set a second deadline for the payment. Where the payment is not made before expiry of the second deadline, the registration shall be rejected.'

'Where the registration has been rejected due to the failure of the registrant to submit missing information or due to his failure to pay the fee before expiry of the deadlines, the fees paid in relation to that registration shall not be refunded or otherwise credited to the registrant.'

8. Article 10(4) of the Fee Regulation states:

'The Agency shall refund the fee levied in accordance with paragraph 1 of this Article if the Executive Director of the Agency rectifies a decision in accordance with Article 93(1) of Regulation (EC) No 1907/2006, or if the appeal is decided in favour of the appellant.'

9. Article 6(1)(e) of Commission Regulation (EC) No 771/2008 laying down the rules of organisation and procedure of the Board of Appeal of the European Chemicals Agency (OJ L 206, 2.8.2008, p. 5; hereinafter the 'Rules of Procedure') provides:

*'The notice of appeal shall contain:
[...]
the pleas in law and the arguments of fact and law relied on.'*

10. Article 12(2) of the Rules of Procedure provides:

'No new plea in law may be introduced after the first exchange of written pleadings unless the Board of Appeal decides that it is based on new matters of law or of fact that come to light in the course of the proceedings.'

SUMMARY OF THE FACTS

11. On 8 November 2010, the Appellant submitted a substance registration dossier using REACH-IT (the on-line tool for the submission of registration dossiers to the Agency which also serves as the primary means of communication between registrants and the Agency). On the same date, an invoice for the payment of the registration fee, with an initial due date of 8 December 2010, was sent to the Appellant via REACH-IT.
12. On 9 December 2010, since the Appellant had not paid the registration fee by the initial due date, the Agency sent the Appellant an invoice reminder via REACH-IT which set a new deadline for payment of 6 February 2011 (hereinafter the 'second deadline'). On 3 January 2011, the Agency sent a

letter to the Appellant via REACH-IT reminding it that the registration fee had still not been paid.

13. On 1 March 2011, the Agency adopted the contested decision in which it rejected the registration on the grounds that the registration fee had not been received by the deadline set. According to the Agency, the contested decision was sent to the Appellant via REACH-IT on 3 March 2011.
14. According to a proof of payment provided to the Board of Appeal by the Appellant, the Appellant made the full payment of the registration fee on 2 March 2011.
15. On 11 April 2011, the Appellant filed an appeal (hereinafter the 'submission of 11 April 2011') with the Registry of the Board of Appeal (hereinafter the 'Registry') against the contested decision.
16. Payment of the Appellant's appeal fee was subsequently received by the Agency on 18 April 2011. On the same date, the submission of 11 April 2011 was served on the Agency and the Appellant was invited by the Registry to complete the notice of appeal by producing certain documents and information.
17. On 27 April 2011, the Appellant provided the documents and information requested by the Registry. In addition, the Appellant lodged an amended version of the notice of appeal (hereinafter the 'submission of 27 April 2011') in which it, inter alia, claimed to describe in more detail the grounds for its appeal.
18. By email of 3 May 2011, the Appellant was requested by the Registry to provide certain additional information. On 4 May 2011, the Appellant provided the requested information. The Appellant's submissions of 27 April and 4 May 2011 were served on the Agency on 4 and 5 May 2011 respectively.
19. On 25 May 2011, the Appellant made an additional payment of the appeal fee to supplement that previously received by the Agency on 18 April 2011.
20. According to the Agency, the Appellant was informed by letter dated 20 June 2011 of the Agency's decision to exceptionally reimburse the registration fee which had been paid by the Appellant after the second deadline set by the Agency.
21. On 20 June 2011, the Agency lodged its defence with the Registry. The Appellant did not provide any observations on the defence and the written procedure was closed by the Board of Appeal on 5 August 2011. No hearing was requested by the parties or considered to be necessary by the Board of Appeal.

ARGUMENTS OF THE PARTIES

Appellant's arguments

22. In its submissions of 11 and 27 April 2011, the Appellant requested the Board of Appeal to annul the contested decision, and order the Agency to assign the registration dossier, which had been rejected by the Agency, a registration number and accept the registration fee paid on 2 March 2011.
23. In support of its request the Appellant claims that it had successfully made its submission for the substance concerned and had fulfilled all the relevant

obligations. The Appellant adds, however, that due to an internal mistake the necessary registration fee was paid 26 days too late. The Appellant contends that the rejection of its registration due to late payment, with the registration fee not being refunded, together with the resulting obligation to make a new submission and pay the registration fee again, is disproportionate and '*out of scale*'. The Appellant contends further that it should be required '*to pay a late payment fee*' only.

Agency's defence

24. In its defence of 20 June 2011, the Agency argues that the appeal is inadmissible as, in particular, it does not fulfil the basic requirements of Article 92(2) of the REACH Regulation and Article 6(1)(e) of the Rules of Procedure in that it did not contain any pleas in law or argumentation supporting the order sought.
25. The Agency supports its claim that the appeal is inadmissible by arguing that:
 - (a) the Appellant did not provide any pleas and/or arguments of a legal or factual nature in its appeal to support the order sought;
 - (b) the Appellant's plea regarding the violation of the principle of proportionality introduced in the submission of 27 April 2011 should be considered to be a new plea within the meaning of Article 12(2) of the Rules of Procedure. The Agency contends further that this 'new plea' should be considered to be inadmissible as it does not comply with the requirements of Article 12(2) which states that new pleas introduced after the first exchange of written proceedings must be based on new matters of law or of fact that come to light in the course of proceedings;
 - (c) contrary to paragraph 25 of the Practice directions to parties to appeal proceedings before the Board of Appeal of the European Chemicals Agency adopted by the Board of Appeal on 8 March 2010 (hereinafter the 'Practice directions'), the Appellant has not clearly identified which facts and which conclusions in the contested decision it disputes; and
 - (d) it considers that by the submission of 27 April 2011 the Appellant changed the orders sought by proposing that the Board of Appeal should impose a late payment fee on the Appellant.
26. Alternatively, the Agency argues that, if the appeal is deemed to be admissible, it is unfounded for the following reasons:
 - (a) the Agency had taken all reasonable measures to put the Appellant in a position to pay the fee on time and that the fault for failure to pay could not be attributed to the Agency; and
 - (b) the Agency was obliged to reject the registration following the late payment of the registration fee and could not have adopted any other measure. The Agency had not therefore violated the principle of proportionality by adopting the contested decision.

REASONS

Admissibility

27. In its defence the Agency made several claims related to the admissibility of the appeal. Each of those claims will be examined in turn below.

Failure to identify the facts or parts of the decision contested by the Appellant

28. The Agency claims in its defence that since the Appellant has not identified which facts and which conclusions in the contested decision are disputed the appeal should be dismissed as inadmissible. In support of this claim it argues that failure to provide this information would prevent the Board of Appeal from examining the grounds of the appeal. The Agency further claims that this is in violation of paragraph 25 of the Practice directions which provides that '*[t]he notice of appeal shall clearly identify which of the facts and which of the conclusions in the contested ECHA decision are disputed by the Appellant. In particular, the Appellant shall specify whether the decision is contested in its entirety or only partially. In the latter case, the contested part shall be specified.*
29. When examining this claim, it needs to be taken into account that the operative part of the contested decision is conspicuously brief, stating only that the registration does not meet the conditions required by the REACH Regulation as the fee payment was not received in full by the deadline set. The contested decision goes on to state that the registration is consequently rejected and the registration fee will not be reimbursed. The remainder of the decision simply offers guidance on how the Appellant may proceed in such circumstances and the legal consequences of such a rejection. No further argumentation or reasoning relating to the rejection is provided by the Agency. The contested decision also contains very few of the facts that lead to its adoption which the Appellant could dispute.
30. In the present case, as it has not limited the parts of the decision it is contesting, the Appellant must be understood as challenging the decision in its entirety. In other words, it is sufficiently clear from the submissions of 11 and 27 April 2011 that the Appellant is contesting the Agency's decision to reject its registration with the fee paid belatedly for its registration being kept by the Agency.
31. In these circumstances, the Board of Appeal is able to examine the appeal and the Agency is not prevented from providing a defence. In fact, the Agency has presented a defence on the basis that the decision is contested in its entirety. Consequently, contrary to the Agency's assertions, its rights of defence have not been infringed.
32. The Agency's claim that the appeal is inadmissible due to the Appellant's failure to identify the facts and parts of the contested decision being contested in the appeal must therefore be dismissed.

Admissibility of the submission of 27 April 2011 and the pleas contained therein

33. The Agency claims that since the submission of 11 April 2011 did not contain any pleas in law the appeal should be dismissed as inadmissible. It claims further that, although the submission of 27 April 2011 did contain a plea in law, that submission is inadmissible as it does not comply with the requirements of Article 92(2) of the REACH Regulation and Article 12(2) of the Rules of Procedure.
34. It is therefore necessary to firstly examine the Agency's claim that the submission of 27 April 2011 and the plea contained therein are inadmissible.
35. As a preliminary remark, it should be observed that the earlier submission of 11 April 2011 contained only brief statements regarding the Appellant's appeal and did not contain any statements which could be considered to be pleas in law. In the later submission of 27 April 2011, however, the Appellant introduces the claim that the contested decision was '*disproportionate and out of scale*'. Consequently, it is only in the submission of 27 April 2011 that the Appellant introduced wording that could be considered to be a plea in law within the meaning of Article 6(1)(e) of the Rules of Procedure.
36. The Board of Appeal would also like to point out that it was unable to identify the difference between the plea that the contested decision was '*disproportionate*' and the plea that it was '*out of scale*'. In the opinion of the Board of Appeal, the two pleas amount to the same thing. Consequently, the Board of Appeal considers it appropriate for the purposes of this appeal to combine the pleas as a single plea that the contested decision is disproportionate.
37. In accordance with Article 92(2) of the REACH Regulation '*the appeal, together with the statement of grounds thereof, shall be filed in writing to the Agency [...]*'. That requirement is expanded upon in the Rules of Procedure. Importantly for the present case, Article 6(1)(e) of the Rules of Procedure provides that a notice of appeal shall contain '*[...] the pleas in law and the arguments of fact and law relied on*'.
38. Whilst the Board of Appeal may declare an appeal inadmissible if it does not comply with Article 92(2) of the REACH Regulation or Article 6(1)(e) of the Rules of Procedure, it should be recalled that Article 92(2) of the REACH Regulation also provides that an appellant is permitted three months within which to file an appeal against a decision of the Agency. Consequently, it follows that, contrary to the Agency's claims, prior to the expiry of that time limit an appellant may, subject to certain restrictions, amend or supplement its original notice of appeal (see by analogy Case C-274/00 P *Odette Simon v Commission*, [2002] ECR I-5999, paragraphs 29 to 31).
39. In this case, it is clear that the submission of 27 April 2011 was received within the time limit provided for in Article 92(2) of the REACH Regulation. Moreover, it relates to the same Agency decision as that contested in the submission of 11 April 2011 and was from the same legal person. Importantly, it should also be noted that the submission of 27 April 2011 contained a clear indication that it was intended to supplement the submission of 11 April 2011 by setting out in more detail the grounds of the appeal.

40. Furthermore, the submission of 27 April 2011 was served on the Agency in a manner that allowed it to prepare its observations thereon. At no point in the proceedings did the Agency request an extension of the time limit for submitting a defence which it is entitled to do in accordance with the second subparagraph of Article 7(1) of the Rules of Procedure.
41. Consequently, the Board of Appeal considers that the submission of 27 April 2011, which was received within the three month time limit set in Article 92(2) of the REACH Regulation, should not be deemed a new notice of appeal but rather as an integral part of the notice of appeal within the meaning of Article 92(2) of the REACH Regulation and Article 6(1) of the Rules of Procedure. It follows that the pleas and arguments presented therein should also be considered to be admissible and the appeal should be examined on the basis of the submissions of 11 and 27 April 2011.
42. It should also be observed that the finding that the submission of 27 April 2011 and the pleas contained therein are admissible does not infringe the Agency's rights of defence and in this case has not unduly delayed the proceedings.
43. In view of the above reasoning, the plea put forward by the Appellant in its submission of 27 April 2011, which was received within the three month time limit set in Article 92(2) of the REACH Regulation, is not therefore considered to be a new plea within the meaning of Article 12(2) of the Rules of Procedure but rather as supplementing or amending the submission of 11 April 2011. In particular, the Board of Appeal is of the opinion that the provisions of the Rules of Procedure must not be interpreted in a way that would limit the rights of an appellant to lodge an appeal at any time up to the last day of the time limit set by Article 92(2) of the REACH Regulation; the REACH Regulation is a norm which is hierarchically superior to the Rules of Procedure. As a result, it is not necessary to examine the Agency's claims based on Article 12(2) of the Rules of Procedure.
44. Consequently, the Agency's claim that the submission of 27 April 2011 and the plea contained therein are inadmissible must be dismissed.
45. Furthermore, since the Board of Appeal has established that the submission of 27 April 2011 and the plea contained therein are admissible, it is not necessary to examine the Agency's claims that the appeal as a whole is inadmissible on the grounds that the Appellant had failed to provide pleas in law in support of the order sought.

Failure to provide legal or factual argumentation to support the plea in law

46. Having established that the submission of 27 April 2011 is admissible and that the appeal therefore contains a plea in law (i.e. the Appellant considers that the contested decision is disproportionate) it is necessary to examine the Agency's claim that the plea is not supported by any factual or legal argumentation and that as a result the appeal as a whole (i.e. the submissions of 11 and 21 April 2011 combined) is inadmissible.
47. In accordance with Article 92(2) of the REACH Regulation and Article 6(1)(e) of the Rules of Procedure an appeal shall contain a statement of grounds for the appeal which includes the pleas in law and the arguments of fact and law relied on by the Appellant. As stated in paragraph 38 of this decision, the failure of an

appellant to comply with those provisions may lead the Board of Appeal to conclude that its appeal is inadmissible.

48. As pointed out by the Agency in its defence, the essential facts and law on which the appeal is based must be set out, at least in summary form, in a coherent and comprehensible manner. Those elements must be sufficiently clear and precise to enable the Agency to prepare its defence and for the Board of Appeal to rule on the appeal (see by analogy for example Case T-359/04 *British Aggregates Association v Commission*, [2010] ECR II-0000, paragraph 81). In other words, the notice of appeal must contain sufficient detail to allow the Board of Appeal and the Agency to understand why the appellant considers the contested decision to be erroneous. In particular, it should be noted that the Board of Appeal cannot be assumed to have any prior knowledge of the specific facts and circumstances of the case brought before it.
49. This requirement is also set out in paragraph 27 of the Practice directions which provides that *'[t]he notice of appeal and other pleadings shall contain not only the pleas in law on which the Appellant relies in support of the appeal, but also a succinct presentation of each of the arguments supporting those grounds. Thus the notice of appeal should contain a written development of each of the factual, legal or other grounds relied on'*.
50. It must be added, however, that the degree of precision and detail required in a notice of appeal varies from case-to-case and is dependent inter alia on the complexity of the issues and claims raised (see by analogy for example Case T-20/94 *Hartmann v Council and Commission*, [1997] ECR II-595, paragraph 37).
51. In the opinion of the Board of Appeal, it is clear from the submission of 27 April 2011 that the Appellant considers that the decision to reject its registration, with the fee being retained by the Agency, and the Appellant being required to submit a new registration due to the fact that it paid the appeal fee after the deadline set, is disproportionate. In other words, the Appellant believes that the consequences of its late payment are too severe having regard to the nature of its non-compliance. In addition, the Board of Appeal considers that the Appellant, in suggesting that it pay an administrative fine for the late payment, rather than changing the order sought, offered an example of what it considered to be a more proportionate penalty for late payment of the registration fee.
52. It should also be remembered that the statement of the grounds on which the appeal is based serves the purpose of illustrating the basis on which the Appellant considers the contested decision should be annulled. In the opinion of the Board of Appeal, the details provided in the submissions of 11 and 27 April 2011 are sufficient to constitute the grounds of the appeal within the meaning of Article 92(2) of the REACH Regulation, Article 6(1)(e) of the Rules of Procedure and the Practice directions.
53. The Board of Appeal also considers that the statement of grounds for the appeal contained in the submissions of 11 and 27 April 2011, despite being brief in nature, is sufficient to allow the Agency to prepare a defence. Indeed it must be pointed out that the Agency has submitted a detailed defence against the grounds presented in the appeal. Consequently, the succinctness of the notice of appeal has not prevented the Agency from defending its interests effectively or led it to defend those interests on the basis of a misunderstanding

of the pleas presented in the notice of appeal. Furthermore, the succinctness of the Appellant's arguments means that the issues to which the Agency needs to respond are correspondingly limited.

54. Likewise, the appeal contains sufficient information to enable the Board of Appeal to rule on it. Contrary to the arguments of the Agency, the Board of Appeal is not therefore prevented from examining the appeal.
55. It follows from the foregoing that the notice of appeal contains sufficient facts and argumentation to satisfy the applicable legislation. The Agency's claim that the appeal is inadmissible on the grounds that the plea in law is not supported by any factual or legal argumentation must therefore be dismissed.

Conclusion on the admissibility of the appeal

56. In view of the above reasoning the appeal complies with Articles 91(1) and 92(1) and (2) of the REACH Regulation as well as Articles 6, 9, 10 and 14 of the Rules of Procedure. The appeal is therefore admissible.

Examination of the Appellant's claims

Violation of the principle of proportionality

57. The submission of 27 April 2011 contains the Appellant's sole plea in law. By that plea the Appellant claims that the Agency's decision to reject its registration due to late payment of the registration fee, with that fee not being refunded, together with the resulting requirement to make a new submission and pay the registration fee again, is disproportionate. The Appellant offers as an example of a more proportionate penalty the imposition of a late payment charge. However, the Appellant did not offer any further justification as to why it considered the Agency's decision to be disproportionate nor why it believed a late payment charge would be more proportionate.

Proportionality of the decision not to refund the registration fee

58. In its defence the Agency informed the Board of Appeal that, by letter of 20 June 2011, the Appellant had been notified of the Agency's decision to refund the fee paid belatedly for the registration. This fact has not been disputed by the Appellant.
59. Since the Agency decided to reimburse the registration fee, there no longer remains an interest for the Appellant in seeking a decision on the issue of whether the initial Agency decision not to refund the registration fee was disproportionate. Consequently, it is not necessary for the Board of Appeal to decide on this point.

Proportionality of the decision to reject the registration

60. The issue to be decided by the Board of Appeal remains therefore whether the Agency's decision to reject the registration due to the late payment of the registration fee was disproportionate.

61. In raising the claim of violation of the principle of proportionality the Appellant is arguing that the Agency should have applied less drastic measures than the rejection of the registration to achieve the aims of the applicable legislation and that it went beyond what was necessary to achieve those aims.
62. In this respect, however, it must be observed from the outset that the relevant provisions of the REACH Regulation and the Fee Regulation are unequivocal regarding the consequences of late payment of the registration fee.
63. Article 6(4) of the REACH Regulation provides that a submission for registration shall be accompanied by the fee set out in the Fee Regulation.
64. The fourth subparagraph of Article 20(2) of the REACH Regulation provides further that '[t]he Agency shall reject the registration if the registrant fails to complete his registration within the deadline set [...]'.
[...]
65. Similarly, Article 3(6) of the Fee Regulation provides that where the registration fee is not paid by the expiry of the second deadline set by the Agency the registration shall be rejected.
66. In claiming that the rejection of its registration breached the principle of proportionality, the Appellant implicitly claims that the applicable rules themselves breach the principle of proportionality. However, the Board of Appeal is not competent to decide on this issue as only the Court of Justice of the European Union can rule on the legality of the REACH Regulation and the Fee Regulation in the light of the principle of proportionality (see by analogy Case T-218/06 *Neurim Pharmaceuticals (1991) Ltd v OHIM*, [2008] ECR II-2275, paragraphs 52 and 53).
67. The provisions of the REACH Regulation and the Fee Regulation concerning the rejection of the registration were clearly in force at the time of the adoption of the contested decision. Consequently, the Agency was under an obligation to apply those provisions provided that it had also fulfilled its own obligations towards the Appellant. Such obligations include, for example, taking all reasonable measures to put the Appellant in a position to pay the fee on time. Where such obligations have been satisfied, a refusal by the Agency to follow those provisions of the REACH Regulation and the Fee Regulation would disregard the presumption of legality, according to which European Union legislation remains fully effective until it has been found to be unlawful by a competent court.
68. Furthermore, the Appellant has not provided any grounds, for example the existence of force majeure or failure by the Agency to fulfill its obligations towards it, which could justify the Agency not applying the relevant legislation. It should be added that an error by the Appellant cannot constitute sufficient grounds for the Agency not applying the clear provisions of the REACH Regulation and the Fee Regulation. In addition, the Appellant did not attempt in its submissions to attribute its error to the actions of the Agency. In fact, it explicitly accepted that the fault was its own. Furthermore, the Board of Appeal has not identified from the facts presented in this case any reasons why the Agency should not have applied the provisions of the applicable legislation regarding the rejection of the registration.
69. In light of the above, in the present case the Board of Appeal considers that the Agency properly applied Article 20(2) of the REACH Regulation and Article 3(6)

of the Fee Regulation when it rejected the registration due to the failure to pay the registration fee within the deadline set.

70. Consequently, the Board of Appeal considers that the Agency did not act disproportionately in rejecting the Appellant's registration due to the late payment of the registration fee.
71. The appeal must therefore be dismissed.

Examination of the possible refund of the appeal fee

72. In accordance with Article 21(1)(h) of the Rules of Procedure, the decision of the Board of Appeal shall contain where necessary a decision regarding the refund of the appeal fee paid.
73. For the purposes of making this decision, it is important to bear in mind that Article 10(4) of the Fee Regulation provides that the appeal fee shall be refunded if the Executive Director of the Agency rectifies a decision in accordance with Article 93(1) of the REACH Regulation, or if the appeal is decided in favour of the Appellant. Article 93(1) of the REACH Regulation provides that the Executive Director may rectify the contested decision within 30 days of the appeal being filed.
74. Since the Board of Appeal decided on the appeal in favour of the Agency in this case the appeal fee cannot be refunded on that basis.
75. As stated in paragraph 58 of this decision however, the Agency informed the Board of Appeal in its defence that during the present proceedings it had decided to refund the registration fee to the Appellant. That decision was notified to the Appellant by letter dated 20 June 2011 (hereinafter the 'decision of 20 June 2011'). It is therefore necessary for the Board of Appeal to examine whether the decision of 20 June 2011 constitutes a rectification within the meaning of Article 93(1) of the REACH Regulation. If in the affirmative, the Board of Appeal is then required to decide whether that rectification sufficiently responds to the order sought by the Appellant and therefore requires a refund of the appeal fee.
76. With regards to the first part of the analysis, the Board of Appeal is required to examine whether the decision of 20 June 2011 has put right or corrected the contested decision. In this respect, it should be noted that the operative part of the contested decision consists essentially of two parts: *'[...] your registration has been rejected'* and *'ECHA will not reimburse any fee received for this registration'*.
77. It should also be pointed out that the decision of 20 June 2011, in which the Appellant was informed that the registration fee was to be reimbursed, clearly states that *'[...] the registration is still rejected. If you wish to submit a new registration for this substance we kindly refer you to the instructions sent in [the contested decision]'*. The first part of the contested decision is therefore retained and the second part of the contested decision can be considered to be deleted.
78. The Board of Appeal considers, however, that it is not necessary for the contested decision to be rectified in its entirety for the Board of Appeal to conclude that a rectification has taken place. In other words, in certain cases a partial rectification of the contested decision may also lead to a refund of the

appeal fee. However, the Board of Appeal considers that it is necessary that a substantial element of the decision has been changed or corrected by the Agency.

79. In the present case, since one of the main elements has been deleted from the contested decision, the Board of Appeal considers that the decision of 20 June 2011 must be considered to be a partial rectification.
80. Having established that a partial rectification of the contested decision may lead to the refund of the appeal fee, it is necessary for the Board of Appeal to address the fact that Article 93(1) of the REACH Regulation provides that the Executive Director may rectify the contested decision within 30 days of the appeal being filed. It should also be recalled that Article 10(4) of the Fee Regulation provides that in order to benefit from a refund the contested decision must be rectified within the meaning of Article 93(1) of the REACH Regulation.
81. It is clear, however, that in this case the decision of the Executive Director to refund the registration fee was adopted well outside that 30-day period. A strict reading of the wording of Article 10(4) of the Fee Regulation together with Article 93(1) of the REACH Regulation would mean that a rectification taking place outside the 30-day period would not result in the refund of the appeal fee.
82. In the opinion of the Board of Appeal, however, such a restrictive reading of those provisions cannot be accepted. The fact that the decision to amend the contested decision took place outside the 30 days foreseen in Article 93(1) of the REACH Regulation should not exclude the possibility of appellants benefiting from a refund of the appeal fee.
83. The opposite interpretation could lead to a situation where an appellant is deprived of its right to a refund by the fact that the Agency delayed its actions. If Article 10(4) of the Fee Regulation were to be interpreted as meaning that any decision to rectify a contested decision outside the 30 days foreseen in Article 93(1) of the REACH Regulation would not result in a refund of the appeal fee, it would mean that the appellant would be forced to bear the consequences of the Agency's failure to act in a timely manner. This could not have been the intention of the legislator when adopting the Fee Regulation.
84. Having established that a partial rectification, which took place outside the 30 days foreseen in Article 93(1) of the REACH Regulation, may in certain cases lead to a refund of the appeal fee, it is necessary to examine whether such a refund is justified in the present case. In this respect the Board of Appeal is required to examine whether the rectification sufficiently responds to the order sought by the Appellant.
85. A crucial consideration in making this decision is the fact that in its appeal the Appellant requested the Board of Appeal to annul the contested decision in its entirety, and order the Agency to assign the submission with a registration number with the registration fee already paid being accepted by the Agency.
86. It is clear that the Agency decision of 20 June 2011 did not therefore satisfy the orders sought by the Appellant as the contested decision remained effective as regards the rejection of the registration. Furthermore, in its appeal, the Appellant did not request the Board of Appeal to order the Agency to refund the registration fee.

87. It should also be noted that during the proceedings the Appellant did not express the opinion that the Agency's decision of 20 June 2011 to refund the registration fee had altered its decision to bring an appeal and seek the annulment of the decision rejecting its registration. In those circumstances, it must therefore be considered that, despite the Agency's decision of 20 June 2011, the Appellant still sought a decision on its request that the Board of Appeal should annul the contested decision and order the Agency to assign its submission with a registration number.
88. As a result of these findings, and bearing in mind that the appeal has been dismissed by the Board of Appeal, the Agency decision of 20 June 2011 cannot be considered to be a rectification that should result in the refund of the appeal fee.
89. The appeal fee is therefore not refunded.

ORDER

On those grounds,

THE BOARD OF APPEAL

hereby:

Dismisses the appeal.

Mercedes ORTUÑO
Chairman of the Board of Appeal

Sari HAUKKA
Registrar of the Board of Appeal